

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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DONALD J. TRUMP, TRUMP ORGANIZATION LLC,

Plaintiffs,

vs.

1:21-CV-1352

LETITIA JAMES in her official capacity as
Attorney General for the State of New York,

Defendant.

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Transcript of a Video Motion Hearing held on
May 13, 2022, the HONORABLE BRENDA K. SANNES, United
States District Judge, Presiding.

A P P E A R A N C E S

(By Video)

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1 (The Court and all counsel present by video,
2 10:00 a.m.)

3 THE CLERK: This is Trump, et al. versus James for
4 a motion hearing, Case 21-CV-1352, can I please have counsel
5 state your appearances for the record.

6 MS. HABBA: Sure. Good morning, your Honor, Alina
7 Habba and Michael Madaio on behalf of Donald Trump and the
8 Trump Organization plaintiffs in this matter.

9 THE COURT: Good morning.

10 MR. AMER: Good morning, your Honor, Andrew Amer
11 and Colleen Faherty with the Attorney General's office for
12 the Attorney General.

13 THE COURT: Good morning to all counsel. We're
14 here today for oral argument on the pending motions, that is
15 the plaintiff's motion for preliminary injunction and the
16 defendant's motion to dismiss. I've identified some of my
17 questions in the text order setting this for a hearing, and
18 since many of the questions involve the motion to dismiss, I
19 will hear from the defendant first.

20 MR. AMER: Thank you, your Honor, and again, for
21 the record, Andrew Amer on behalf of the Attorney General's
22 office. I did want to make a few preliminary comments before
23 I dive right into the issues that the court's order asked us
24 to focus on. The Office of the Attorney General is nearing
25 the end of its three-year investigation into allegations of

1 fraud and misrepresentation involving the Trump Organization
2 and individuals affiliated with the company, including Donald
3 Trump. That investigation has repeatedly required
4 intervention and supervision by the New York Supreme Court
5 through a special proceeding which has been presided over by
6 Justice Arthur Engoron. Since August of 2020, Justice
7 Engoron has heard and decided motions challenging aspects of
8 our office's subpoenas and that includes challenges brought
9 by both of the plaintiffs here, the Trump Organization and
10 Mr. Trump. And Justice Engoron has issued a number of
11 orders, both reaffirming the lawfulness of the investigation
12 and, more recently, enforcing its own orders through contempt
13 proceedings. It was only recently, your Honor, after our
14 office subpoenaed Mr. Trump for his evidence that the
15 plaintiffs brought this action in this court to enjoin our
16 nearly-concluded investigation.

17 We submit that in light of the procedural history
18 and the current state of the record, that it is really hard
19 to conceive of circumstances that present a more clear and
20 compelling argument than the one here for abstention by a
21 federal court in deference to an ongoing state court
22 proceeding. And I'd like to first address the *Younger*
23 abstention argument which we raise on our motion which
24 focuses on the court's questions in the April 29th order.

25 So in the *Sprint* case, the Supreme Court identified

1 the three circumstances that qualify for abstention in
2 *Younger*. We're here only concerned with the second and third
3 circumstance, I think it's clear the first circumstance does
4 not apply. The second circumstance is when you have a civil
5 enforcement proceeding, and the third circumstance is when
6 you have a civil proceeding that implicates a state's
7 interest in enforcing the order of the judgments of its
8 courts. We contend that the New York proceeding before
9 Justice Engoron meets both of these circumstances. And
10 notably, in their opposition papers, plaintiffs actually
11 don't dispute that that is the case. Instead, they rely
12 solely on the so-called bad faith exception to *Younger*.

13 THE COURT: And let me ask you a question about
14 that. Hasn't this special proceeding been used only for the
15 purpose of orders regarding discovery?

16 MR. AMER: Well, they've been used in connection
17 with the enforcement of administrative subpoenas, so I think
18 it's broader than that, and that requires, as a necessary
19 finding, to compel in compliance with the subpoenas that the
20 investigation which gives rise to the subpoenas was a lawful
21 investigation and had a justifiable basis. So --

22 THE COURT: And let me ask another question. Can
23 this special proceeding result in an order enjoining persons
24 for illegal or fraudulent acts under Executive -- New York
25 Executive Law 63(12), or would that be a different

1 proceeding?

2 MR. AMER: That would require an enforcement
3 proceeding but it could certainly result in subpoenas that we
4 issue through 63(12) not being enforced; in other words, the
5 court could quash subpoenas, and that's part of the relief
6 that plaintiffs have sought in the New York proceeding. So
7 we would certainly say, based on the papers, that the
8 plaintiffs have conceded by omission that the New York
9 proceeding falls within both the second and third
10 circumstance, but I understand the court has asked us to
11 address those circumstances specifically.

12 THE COURT: And I don't think the fact that they
13 haven't argued that means that the court would just -- I
14 think the court independently has to determine whether it has
15 jurisdiction here and whether abstention is appropriate. And
16 so my question was, to the extent this is really just a
17 subpoena enforcement action, at least one circuit, the Third
18 Circuit in the *Smith & Wesson* case, found that that was not a
19 civil enforcement proceeding akin to a criminal prosecution.

20 MR. AMER: And I -- let me address that. I will
21 say that of the two circumstances, the third circumstance
22 which involves the Second Circuit's decision in *Cavanaugh* is
23 clearly the easier one for the court to address and find is
24 met here, and I'm happy to take them in either order. I was
25 going to address the *Cavanaugh* decision and the third

1 circumstance first but I'm happy to reverse that if your
2 Honor would prefer.

3 THE COURT: No, that's fine.

4 MR. AMER: Okay. So the third circumstance, which
5 was discussed by the Second Circuit in the *Cavanaugh* case, in
6 that case, the Second Circuit reaffirmed its earlier holding
7 in the *Falco* decision and also quoted to the Supreme Court's
8 decision in the *Juidice v. Vail* case. And the Second Circuit
9 in *Cavanaugh* made clear that where a state's contempt process
10 is involved, the state court proceeding fits neatly into the
11 third circumstance. And the court expressly noted in
12 *Cavanaugh* that federal courts should not interfere with state
13 court proceedings involving the state's contempt process,
14 "because the contempt process stands in aid of the authority
15 of the judicial system so that its orders and judgments are
16 not rendered nugatory," and that's set forth 33 of the
17 *Cavanaugh* decision and that's also quoting the *Juidice*
18 decision.

19 Now we argued in our briefs which of course were
20 filed before the contempt motion and the contempt order that
21 the New York proceeding fits within the third circumstance
22 because it's a special proceeding to enforce an Attorney
23 General's administrative subpoenas based on the decisions in
24 two District Court cases outside the Second Circuit. We
25 relied on the *Lupin* case from the District of Maryland and

1 the *Backpage* case from the Eastern District of Missouri, and
2 both of those cases did involve, to your Honor's point, a
3 special proceeding like we have in New York to enforce an
4 administrative proceeding -- I'm sorry, to enforce an
5 administrative subpoena, and in both those cases, the court
6 held that in fact, yes, the third circumstance was met, and
7 we certainly stand by that position and those authorities.
8 But now that there are contempt proceedings involved in the
9 New York proceeding, it seems to me that is really beyond
10 debate that we fit within the third circumstance.

11 THE COURT: And let me ask you, what's the impact
12 of Justice Engoron's order conditionally purging the contempt
13 order if Mr. Trump meets the four conditions?

14 MR. AMER: We don't think it has any impact in
15 terms of the fact that the contempt proceedings are still
16 ongoing before Justice Engoron. Mr. Trump has appealed the
17 contempt proceeding so that actually continues in the First
18 Department, so the contempt proceedings certainly are
19 ongoing. Whether Mr. Trump will conditionally satisfy those
20 acts that he must undertake by May 20th remains to be seen,
21 but I would say even if that is the case, it doesn't matter.
22 Clearly Justice Engoron has issued orders that he feels were
23 necessary to ensure the integrity of his own decisions and
24 the fact that those -- the contempt finding is up on appeal
25 and, quite frankly, won't be heard until the fall because the

1 Appellate Division doesn't hear argument over the summer, you
2 know, clearly that means contempt proceedings will continue
3 to go on, at least through the fall. So here, the state
4 clearly has an interest in the ongoing contempt process in
5 the New York proceeding and it's through that process that
6 the court is vindicating its regular operation of the
7 judicial system, and that should be protected from
8 interference by a federal court, certainly under the
9 *Cavanaugh* decision.

10 So let me turn to the second circumstance and the
11 *Smith & Wesson* case. So the Second Circuit under *Sprint*
12 covers civil enforcement proceedings that are akin to
13 criminal prosecution in important respects, that's the
14 standard. *Sprint* identified three indicia of such
15 proceedings. One, it needs to be initiated by a state actor,
16 I think we clearly meet that obviously, the special
17 proceeding in New York initiated by the Attorney General;
18 two, it needs to be a proceeding that is to sanction the
19 federal plaintiffs for some wrongful conduct. Here, the
20 special proceeding to enforce the subpoena was initiated to
21 address a failure to comply with a lawful subpoena so we
22 think the second indicia is met. And third, it needs to
23 involve an investigation of the type that commonly culminates
24 in the filing of a formal complaint or charges. We think
25 that's met as well. The type of investigation that we are

1 undergoing under Executive Law 63(12) is clearly the type
2 that leads to an enforcement proceeding and I think, as
3 evidenced by our voluminous 113-page supplemental verified
4 petition, there's clearly been a substantial amount of
5 evidence amassed that could support the filing of an
6 enforcement proceeding, although the final determination on
7 filing that proceeding has yet to be made.

8 In terms of *Smith & Wesson*, clearly the Third
9 Circuit's recent decision cuts against us. It held that a
10 New Jersey subpoena enforcement action did not qualify as a
11 civil enforcement proceeding. Firstly, of course, that
12 decision out of the Third Circuit would not be binding on
13 this court. We would urge the court to instead follow the
14 reasoning of the Missouri District decision in *Backpage*. And
15 in *Backpage*, the court held that a proceeding commenced by
16 the Missouri Attorney General to enforce an administrative
17 subpoena, just like the New York proceeding, did in fact
18 satisfy the indicia of the second circumstance under *Sprint*.

19 I would also add there is a factual distinction
20 here between our case and the *Smith & Wesson* case. In *Smith*
21 & *Wesson*, it involved an investigation that the Third Circuit
22 noted was very limited in scope, and in fact the Third
23 Circuit noted that the limited nature of the investigation
24 distinguished the case from "those where more robust
25 preliminary investigations led to the filing of

1 administrative complaints," and that's at the *Smith & Wesson*
2 decision at 891 to 92. I think here, as demonstrated again
3 by the supplemental verified petition that we filed, the
4 investigation is very broad and robust, pursuant to 63(12).
5 So in that respect, we think to the extent that the court
6 would look to the Third Circuit's reasoning, we do have a
7 factual distinction.

8 I did want to address the bad faith exception
9 because that is the basket into which the plaintiffs have put
10 all their eggs when it comes to the *Younger* abstention
11 doctrine. It is an extremely narrow exception, it's hardly
12 ever been applied, and we submit it clearly does not apply
13 here. Justice Engoron found that the Attorney General's
14 commencement of the investigation on the basis of Michael
15 Cohen's congressional testimony was totally appropriate, and
16 he has repeatedly found that the investigation is lawful. If
17 I might quote from page 5 of Justice Engoron's February 17th,
18 2022 order, he said, "This court's in-camera review of the
19 thousands of documents responsive to OAG's prior subpoenas
20 demonstrates that OAG has a sufficient basis for continuing
21 its investigation, which undercuts the notion that this
22 ongoing investigation is based on personal animus, not facts
23 and law." So we think that the evidence we've discussed in
24 the supplemental verified petition, as well as Justice
25 Engoron's findings to date, really shuts the door on any

1 argument that plaintiff has raised about this narrow bad
2 faith exception applying here.

3 THE COURT: And let me ask you one final question
4 to make sure I understand. If there was a proceeding to
5 enjoin illegal or fraudulent acts, that would be a separate
6 proceeding, it wouldn't be under this, it wouldn't be
7 under -- before Justice Engoron in this proceeding?

8 MR. AMER: Well, whether it would be before Justice
9 Engoron or not I think is an open question, but it would need
10 to be, A, a new petition which would be filed as a -- as an
11 enforcement action under 63(12).

12 THE COURT: I see.

13 MR. AMER: And that's -- that's the typical course,
14 so there's an investigation under 63(12), subpoenas are
15 issued in that investigation, the investigation may give rise
16 to motions to quash or compel, and then when the
17 investigation is over, that could be followed by the filing
18 of an enforcement action. And that is exactly what happened
19 with the *Exxon* case our office handled, it went from the
20 investigation and subpoena enforcement proceedings straight
21 into an enforcement action.

22 THE COURT: And presumably it would get a new case
23 number?

24 MR. AMER: It would get a new index number, yes.

25 THE COURT: Okay.

1 MR. AMER: Before turning to the third point in
2 your Honor's April 29th order, which asked us to address
3 issues raised by the supplemental letter brief that was filed
4 by plaintiffs, I did want to say a quick word about some of
5 our other arguments for abstention and specifically just with
6 *Colorado River*, I note this court a few weeks ago issued a
7 decision in *Hoffman v. American Institute of Indian Studies*
8 and in that case, the court analyzed the six *Colorado River*
9 factors and granted the defendant's motion to abstain. We
10 would submit applying that same analysis from the *Hoffman*
11 case to the facts here should lead to the same result. In
12 fact we think this case is actually stronger for *Colorado*
13 *River* abstention than the *Hoffman* case because here, the
14 inconvenience of the forum factor which was neutral in the
15 *Hoffman* case does weigh in favor of abstention here. The
16 lawyers from the Attorney General's office on my team working
17 on -- with me on the investigation are all based in New York
18 City as are the lawyers representing the plaintiffs here, the
19 documents and witnesses that have been subpoenaed as part of
20 the investigation are mostly located here in New York City, I
21 would say, and a number of the properties that are the
22 subject of the valuations that are under investigation are
23 located in New York City. In contrast, as far as we can
24 tell, there is zero connection to the Northern District of
25 New York, no witnesses, no documents, no properties, no

1 lawyers. There's just absolutely zero connection to the
2 Northern District. So on that basis --

3 THE COURT: Let me ask you a question about
4 *Colorado River*. The Second Circuit has said that the primary
5 context in which the Second Circuit has affirmed *Colorado*
6 *River* abstention is in order to avoid piecemeal litigation,
7 which means lawsuits that pose a risk of inconsistent
8 outcomes not preventible by principles of res judicata and
9 collateral estoppel; do we have that kind of piecemeal
10 litigation issue here?

11 MR. AMER: I think we do. In fact, I think this is
12 a classic example of claim splitting. I mean, Mr. Trump has
13 invoked the jurisdiction affirmatively of the New York
14 Supreme Court by moving to quash subpoena in -- before
15 Justice Engoron. One of the arguments he has raised there is
16 an equal protection selective enforcement argument which is a
17 constitutional issue. They are asking before Justice
18 Engoron, they argued that based on all the same evidence of
19 the comments from the Attorney General that the court quash
20 the subpoena and find that the investigation is based on
21 animus, and all those arguments were heard and rejected. Now
22 why they didn't assert the rest of their federal
23 constitutional claims before Justice Engoron, that was their
24 choice. They had the opportunity to do so. And here, the
25 court is being asked to enjoin the very investigation that

1 Justice Engoron has repeatedly upheld as lawful and has
2 issued any number of orders compelling compliance with the
3 subpoenas issued in that investigation, so it's hard to
4 imagine any more direct conflict that could arise, you know,
5 beyond, you know, where we have one court issuing orders
6 upholding an investigation as lawful and compelling
7 compliance with subpoenas where, on the other hand, another
8 court is being asked to enjoin the very investigation that
9 gave rise to the subpoenas. So I think absolutely, the
10 concern about piecemeal litigation exists here, certainly.

11 In terms of the supplemental letter brief that
12 plaintiffs have submitted at the court's invitation, the
13 letter brief does not provide any persuasive authority for
14 either of the two legal points that the court invited the
15 plaintiffs to address. One issue was whether Justice
16 Engoron's prior orders, including the February 17, '22 order
17 and the most recent contempt order, are final and appealable.
18 We cited to the New York Court of Appeals decision in *Matter*
19 *of Abrams*, that's at page 24 of our moving brief, and that
20 case holds that it's settled law in New York that a decision
21 denying a motion to quash an Attorney General administrative
22 subpoena is final and appealable, full stop. So it deals
23 exactly with the circumstance that we have in the New York
24 proceeding, and it makes clear that it's settled law that
25 that type of order is final and appealable.

1 THE COURT: And let me ask you a question about
2 that. The plaintiff has cited to the fact that Justice
3 Engoron's orders, some of them are marked nonfinal
4 disposition. What's the significance of that?

5 MR. AMER: We don't think that that has any
6 significance because that's just an indication that Justice
7 Engoron appreciated that the investigation was still ongoing.
8 So that there may be additional subpoenas that would need to
9 be enforced. The point of the *Matter of Abrams* case is to
10 acknowledge that within a special proceeding that is dealing
11 with individual subpoenas, you're going to have discrete
12 orders that either quash or compel the subpoena, sort of like
13 a one-act play within a larger production. But they are
14 within themselves final and appealable. And I think, you
15 know, it's important to note that plaintiffs by their own
16 conduct really belie any argument that the orders issued by
17 Justice Engoron in the special proceeding are not final and
18 appealable since they've now appealed both the February 17th,
19 '22 order and the more recent contempt order. So it's hard
20 to see how they could on the one hand be pursuing these
21 appeals and on the other hand contend that in fact the orders
22 they are appealing are not final and appealable. And there
23 is no authority that they've cited that would suggest that
24 this specific type of order, which is an order issued in a
25 special proceeding to enforce an administrative subpoena, is

1 not final and appealable. I think they've cited to decisions
2 that deal with interlocutory orders in your standard plenary
3 cases but that's just not relevant. And I would say here
4 that to the extent that any of Justice Engoron's orders were
5 marked as nondispositive, you know, certainly the
6 February 17th, '22 order was not so designated, nor was the
7 contempt order designated in that way. So again, I think
8 that's just Justice Engoron keeping the proceeding open to
9 entertain any further administrative subpoena motions with
10 respect to that.

11 THE COURT: And I'm looking at the February '22
12 order, it does appear to be marked nonfinal disposition.

13 MR. AMER: Yeah, and I apologize if I misspoke. I
14 do think that, again, it's because Justice Engoron envisions
15 that the proceeding remain open so that he can retain
16 jurisdiction over the case.

17 THE COURT: I see.

18 MR. AMER: But you know, clearly neither side has
19 interpreted that to mean that the order is not final and
20 appealable because plaintiffs have appealed, and again, I
21 think *Matter of Abrams* makes it quite clear that that's
22 correct. These are appealable orders.

23 THE COURT: And is the fact that it's appealable
24 enough to make it a final order under New York law for
25 *res judicata*?

1 MR. AMER: It does. Because it gives the other
2 side the opportunity to appeal it, and it is considered
3 final. There's nothing more that needs to happen with
4 respect to the subpoena enforcement. Once the -- for
5 example, on the February 17th, '22 order now up on appeal, if
6 that decision is affirmed, nothing more needs to happen
7 before Justice Engoron before we can compel Mr. Trump to sit
8 for a deposition to give testimony under oath.

9 THE COURT: Yes.

10 MR. AMER: So we think, you know, the standard
11 under *res judicata* for finality is met with respect to the
12 character and nature of these orders.

13 THE COURT: Let me ask you a question with respect
14 to the orders before the February 2022 order, there were no
15 motions to quash, one in fact was a stipulation and order, is
16 it your position that *res judicata* applies to those orders as
17 well, even though there was never a motion to quash?

18 MR. AMER: Yes, because there were motions to
19 compel, which is the flip side, and certainly gave them the
20 opportunity, the subpoena recipients the opportunity to raise
21 any issues, and we disagree that the September '21 order is
22 something less than an order just because it was a stipulated
23 order. The parties agreed to it but the court so ordered it,
24 and that gives it the force of a court order just like any
25 other stipulated order and the fact that the parties were

1 able to resolve the issues through a stipulated court order
2 doesn't mean that it's any less of a court directive and
3 order that can be enforced as any other court order. And in
4 fact, we have gone back and enforced the terms of the
5 September 2021 order by having the court, you know, allow us
6 to appoint a monitor which is HaystackID as the third-party
7 monitor.

8 THE COURT: Your position is that the
9 February 17th, 2022 order, that order alone is a final
10 judgment on the merits that bars the plaintiff's claims under
11 *res judicata*, is that right?

12 MR. AMER: Yes, yes, that's correct, your Honor.
13 And certainly there was the opportunity on the motion to
14 quash to raise any and all of the federal claims raised here,
15 and in fact, one of the claims that was raised, as I
16 mentioned, was an equal protection argument. So the notion
17 that somehow the New York Supreme Court can't entertain
18 federal constitutional claims is incorrect.

19 And that leads me, actually a good segue to the
20 second legal point that your Honor invited plaintiffs to
21 argue in the supplemental brief which was the issue of
22 whether plaintiffs could have raised the constitutional
23 claims asserted here in the New York proceeding. We cited on
24 pages 14 and 15 of our moving brief cases that establish that
25 because the New York Supreme Court is a court of plenary

1 jurisdiction, that court certainly has the jurisdiction to
2 hear all of the constitutional arguments that plaintiffs have
3 raised in this action. And we've demonstrated through the
4 cases we've cited that in fact the New York Supreme Court
5 routinely does hear such arguments and does so in the
6 specific context of a special proceeding to compel compliance
7 with an Attorney General administrative subpoena. Plaintiffs
8 have cited no case in their supplemental letter that suggests
9 otherwise. Plaintiff's argument seems to be that as a
10 factual matter, it chose not to raise any of the federal
11 claims in the New York proceeding but that's, again, you
12 know, a matter of choice, it's not that they couldn't have
13 done it, it's that they chose not to do it, and that again
14 points to the concern about claim splitting and piecemeal
15 litigation. And again, you know, plaintiff's own conduct
16 belies any argument that they're unable to raise their
17 constitutional claims before Justice Engoron. They did raise
18 a constitutional argument, and in fact they relied on all of
19 the same comments that form the basis for the allegations in
20 the complaint here. I'll just mention to you, quote to you
21 from Justice Engoron's February 17th order on the bottom of
22 page 4, he notes, "The new Trump respondents further assert
23 that public statements made by Attorney General Letitia James
24 demonstrate the impropriety of her investigation. In support
25 of this argument, they cite to dozens of public statements

1 that James made during her election campaign and afterward,
2 indicating that she intended to investigate any illegal
3 conduct of respondent Donald J. Trump." So I point that out
4 because the evidentiary record was placed before Justice
5 Engoron, that would have certainly permitted them to raise
6 all of the same constitutional arguments they raised here,
7 and they just chose not to. Instead, they cherrypicked an
8 equal protection argument which they raised and was rejected.

9 Finally, I did want to mention about the letter
10 brief that it raises one new argument that I would like to
11 address. The plaintiffs cite to the Second Circuit decision
12 in *Vance v. Trump*, and they cite to that for the proposition
13 that they are entitled to a federal forum as opposed -- as a
14 matter of federalism and comity.

15 As a threshold matter, we don't think this argument
16 is actually properly before the court since it was not in
17 plaintiff's opposition to our motion and is actually being
18 raised for the first time in a supplemental brief that was
19 solely for the purpose of responding to the two issues the
20 court invited comment on. So we think the court should not
21 entertain this new argument based on the *Vance* case. But to
22 the extent that the court does decide to consider this new
23 argument, we think it's very clear that *Vance* has no
24 application here because the case turned on the very highly
25 specific and unique fact that the subpoena enforcement action

1 involved a sitting president. Here, Mr. Trump was no longer
2 in office when the Attorney General served him with the
3 subpoena in December of last year, he was no longer in office
4 when he filed this action a few weeks later, he was not in
5 office when he invoked affirmatively the jurisdiction of the
6 New York Supreme Court to quash the subpoena in January, and
7 he was not in office when Justice Engoron denied the motion
8 in February or when Justice Engoron concluded that Mr. Trump
9 was in contempt of his February order, which Justice Engoron
10 determined in April. So we think Vance just has no
11 application to this case whatsoever. This case involves
12 abstention in deference to a subpoena enforcement action,
13 brought in the state court against an ordinary citizen and
14 nothing more.

15 As this court is aware, we also rely on *Wilton*
16 abstention, and part of that analysis asks whether the
17 federal action is being used to forum shop. We think the
18 answer to that question is clearly yes. Again, we see zero
19 connection to the Northern District with respect to any
20 aspect of this case or the New York proceeding.

21 We also raise a *Rooker-Feldman* doctrine argument.
22 We think it's clear that the court is being asked to review
23 decisions that were rendered against the plaintiffs here like
24 Justice Engoron and to take, you know, a collateral attack on
25 those decisions and to reject those decisions because by

1 definition, the court here would be asked to find that the
2 investigation which Justice Engoron repeatedly held was
3 lawful was in fact unlawful and exclusively motivated by
4 animus.

5 You know, the rest of the arguments on those
6 doctrines are laid out in the briefs and, you know, I won't
7 go into them any more unless the court has any specific
8 questions.

9 The *res judicata* point I think I've covered in
10 connection with your Honor's questions, and we also obviously
11 raise the argument that even in the absence of *res judicata*,
12 there's a failure to allege sufficient facts to support the
13 claims here because as a necessary element to each of
14 plaintiff's claims, the court must find that the
15 investigations read out any legitimate basis and for the same
16 reason that Justice Engoron concluded that there was a
17 legitimate basis, I think this court should make that same
18 conclusion. There's no dispute that the investigation was
19 commenced based on congressional testimony given by Michael
20 Cohen, and, you know, I think Justice Engoron even commented
21 that for the Attorney General not to have investigated based
22 on that congressional testimony would have been problematic.

23 And certainly once you get past the commencement of
24 the investigation, then you have our 113-page verified
25 supplemental petition which lays out in Technicolor detail

1 all of the evidence that we've amassed to date and based on,
2 you know, and there's no dispute about the evidence that
3 we've uncovered. We just don't see how plaintiff's
4 allegations are sufficient because they don't plausibly
5 allege that there's no legitimate basis for the
6 investigation.

7 So unless the court has any questions, we certainly
8 obviously ask that the court grant our motion to dismiss and
9 deny the PI application as moot.

10 THE COURT: Okay, thank you very much, Mr. Amer.
11 And I'll hear from Ms. Habba. And let me ask you first, in
12 the briefing the plaintiffs did not dispute that the *Younger*
13 abstention doctrine applied; do you agree that here, in light
14 of the contempt proceedings, the *Younger* abstention doctrine
15 does apply? I know you've argued bad faith but do you agree
16 that as an initial matter, because of the pending contempt
17 proceedings, the *Younger* abstention doctrine does apply?

18 MS. HABBA: No, your Honor, and if that wasn't
19 clear, let me make that clear for the record. We do not
20 believe the *Younger* abstention applies, and our pointing out
21 the abstention was solely in our basis of knowing that that
22 was going to be a defense of Ms. James. And clearly we don't
23 even think it applies here, we actually don't think any of
24 the numerous doctrines which they mention apply but we have
25 hit them head on intentionally with exceptions, and I'm happy

1 to go through them. I actually prepared a statement for your
2 Honor, which I think will address most of your questions
3 based on the questions you asked Mr. Amer. If you'd like me
4 to read it into the record, I would love to and then I will
5 address some things that were inaccurate, I believe, put on
6 the record by Mr. Amer.

7 THE COURT: Okay.

8 MS. HABBA: If that's okay, yes?

9 THE COURT: Sure.

10 MS. HABBA: Thank you, your Honor. United States
11 Supreme Court Justice Robert Jackson once said, while the
12 prosecutor, at his best, is one of the most beneficent forces
13 in our society, when he acts for malice or other base
14 motives, he is one of the worst.

15 Sadly, Letitia James serves as the embodiment of
16 this quote and has proven just how destructive malice can be.
17 Letitia James' egregious and wildly inappropriate comments
18 are unprecedented in New York's history and that's why we
19 brought this cause of action. Never before has the state's
20 chief law enforcement official made her hatred toward the
21 subject of an investigation so obvious. Our complaint
22 contains over 50 statements made by Ms. James specifically
23 targeting the former President.

24 On the campaign trail, just to give the court some
25 color, I'm not going to go into all of them, she proclaimed

1 to members of the Bronx Democratic Party that she "looks
2 forward to going into the office of the Attorney General
3 every day, suing him, defending your rights, and then going
4 home." She made her agenda overwhelmingly clear stating that
5 we "need to find out where he's laundered money, all of those
6 transactions have happened here in New York City," despite
7 the fact, your Honor, that at that point she did not possess
8 or even have the authority to possess a ...

9 (Attorney Habba's audio cut out.)

10 (A discussion was held off the record.)

11 MS. HABBA: I'm sorry, I'll repeat what I said. At
12 that point that she was making those statements, that was
13 before she was in office and that's really relevant here for
14 our papers because she didn't have any evidence and she was
15 already putting out accusations that are incredibly damaging,
16 incredibly frightening, and she ran on the premise to her
17 constituents that that was what she was going to do, without
18 any grounds to do it. I think that speaks volumes here and
19 that's why I wanted to reiterate that. She made it
20 absolutely clear that she was obsessed with, as she said,
21 taking on Trump and that her eyes would be on Trump Tower.

22 If all these statements are not enough to shock the
23 conscience, she further assured her supporters, "Oh, we're
24 definitely going to sue him, we're going to be a real pain in
25 the ass, he's going to know my name personally." This is --

1 THE COURT: Let me just ask you, Ms. Habba, I've
2 read the complaint so I'm familiar with all of those
3 statements.

4 MS. HABBA: Right. So I'll skip ahead to basically
5 the grounds which we feel show and are unrelated to the
6 action that is pending in front of Justice -- Judge Engoron.
7 So basically, yes, shortly after, she held true to her
8 campaign promises, she relied on the testimony of Michael
9 Cohen, as Mr. Amer obviously does not contest, who was a
10 convicted felon and liar and she initiated this
11 investigation. As --

12 THE COURT: And let me just ask you, do you agree
13 that that was a factual predicate for the investigation?

14 MS. HABBA: The basis of Michael Cohen's testimony?

15 THE COURT: Yes.

16 MS. HABBA: Yes.

17 THE COURT: For the investigation that ensued, that
18 that was a factual predicate for the investigation.

19 MS. HABBA: I don't know how to answer that
20 question, your Honor, solely because I believe Michael Cohen
21 was the impetus to her having an excuse. I don't believe
22 that --

23 THE COURT: And I understand that argument but do
24 you agree that based upon his testimony, the investigation --
25 and the investigation that followed up, his testimony was a

1 factual predicate for that investigation?

2 MS. HABBA: It may have been a factual predicate
3 but an indication of their ill intent at the same time.

4 THE COURT: I see.

5 MS. HABBA: As we will discuss at length, the bad
6 faith exception, even if your Honor did think the *Younger*
7 doctrine should apply --

8 THE COURT: Let's start with the doctrine itself.

9 MS. HABBA: Sure.

10 THE COURT: Do you agree that in light of the civil
11 contempt proceedings, this action does fall under, first the
12 court would have to determine whether it falls under the
13 *Younger* abstention doctrine so do you agree in light of the
14 civil contempt proceedings, it does fall under the *Younger*
15 abstention doctrine?

16 MS. HABBA: No, your Honor, I don't and I'm happy
17 to walk through that from the top if that's what you're
18 asking.

19 THE COURT: Sure.

20 MS. HABBA: Generally speaking, a federal court, as
21 you know, has virtually unflagging jurisdiction to hear a
22 matter. A federal court can abstain from exercising
23 jurisdiction in rare exceptional circumstances; that is when
24 this abstention is supposed to be applied. It's the
25 exception, not the rule. Here the test is, as your Honor has

1 implicated, that abstention is only appropriate when there
2 are one of three types of ongoing proceedings. Mr. Amer and
3 your Honor I believe stated that the first clearly does not
4 fall within this case. The second, which is what it appears
5 the OAG is relying on, is that there are certain civil
6 enforcement proceedings. That would be akin to a criminal
7 prosecution case, that's what case law has said, punishing
8 wrongdoing that has been proven. Here we're only in a
9 fact-finding investigation stage, this is not applicable
10 here. Frankly, your Honor, Judge Engoron himself, I can read
11 into the record, stated, when I stated -- I'll just read this
12 quote. I said on the record, "She's put her words out there
13 so much and taken every opportunity to voice her vendetta
14 against Donald Trump and his family to take him down, my
15 client is entitled to the protections afforded to him by the
16 Constitution against prosecutorial misconduct." The judge
17 said, "Let me say, I'm not the disciplinary committee or --
18 so some of the ethical questions are not in front of me, I
19 tend to say they're not part of the case, this case that I
20 have in front of me." That is the judge's words himself.

21 Those, here we have -- so that's the second prong,
22 it has to be one of these. The second in my opinion does not
23 qualify here.

24 The third prong would be that it would be a civil
25 proceeding involving certain orders uniquely in furtherance

1 of the state court's ability to perform their judicial
2 function. State proceedings is only ruling on discovery
3 motions here. If this were to be considered to qualify, then
4 every single state action would qualify because all judges
5 rule on discovery motions. This is not uniquely in
6 furtherance of the state court's ability --

7 THE COURT: Isn't the civil contempt proceeding in
8 furtherance of the state court's --

9 MS. HABBA: We --

10 THE COURT: -- process for compelling compliance
11 with judgments?

12 MS. HABBA: Your Honor, the contempt issue which
13 has been conditionally purged is not the purpose of this
14 case, it's not why we brought this case, and that is a
15 separate discovery issue again, and it is being handled by
16 the lower court. That is not on the table and nor do we ask
17 that you handle the contempt motion, your Honor. Frankly, it
18 goes to the basis and the motivation of the entire
19 investigation. That is what this case is, so we do not
20 believe the *Younger* abstention applies at all. If --

21 THE COURT: And let me ask you a question, that the
22 defendant has cited to the plaintiff's failure to raise these
23 challenges to the investigation until the investigation was
24 over two years -- had already been proceeding for over two
25 years. Isn't a motion to quash the proper vehicle to

1 challenge, you know, in response to these motions to compel
2 that were filed by the Attorney General's office?

3 MS. HABBA: Your Honor, thank you for bringing that
4 up, that's a good point. The motion to quash is, and this is
5 the best way to put it in plain English without me going into
6 a diatribe of case law, but as your Honor's aware,
7 *res judicata* and *Rooker-Feldman*, that's not an issue here
8 because all we're doing is dealing with subpoenas, individual
9 subpoenas before Judge Engoron, we're not dealing with the
10 investigation's purpose, the reason that she brought the
11 investigation, the constitutional violations that happened
12 prior. And the Trump Organization, when they were brought,
13 just to give -- and I'd be happy to briefly recite the
14 procedural posture of this action, but soon after being
15 elected Attorney General and while Donald Trump was sitting
16 as President, Letitia James initiated this investigation
17 against the Trump Organization, that was March 2019, and that
18 led to the Article 4 proceeding. This proceeding was and is
19 very limited in scope. Indeed, the state court specifically
20 stated it is only fact finding in nature and only for the
21 purpose of gathering evidence and compelling discovery.
22 Those are quotes from the court. The court --

23 THE COURT: And why didn't the plaintiffs raise
24 these constitutional challenges earlier?

25 MS. HABBA: Because --

1 THE COURT: I'm sorry, the complaint says that the
2 plaintiffs have produced over 8 million pages of documents in
3 response to the defendant's subpoenas.

4 MS. HABBA: Correct, your Honor, we complied in
5 good faith with the subpoenas of the Attorney General, but
6 it's important to note that Donald Trump was only brought
7 into this action recently, a couple months ago. And the
8 court said -- made it very clear that they were not going to
9 address the underlying merits as there is no case, that would
10 be issued in another docket with a different judge. We even
11 filed motions to bifurcate the action when we started this
12 action to have these issues addressed.

13 Your Honor, to put it in simple terms, we are
14 sitting with our hands tied, we are simply dodging subpoenas
15 at this point. We have no right to discovery, we have no
16 right to look into why this was brought and the
17 constitutional cases. And the only vehicle that we tried to
18 bring, Mr. Amer's right, we tried to bring it in a motion to
19 quash but that wasn't relevant, the judge isn't hearing the
20 merits of the case which is exactly about why the federal
21 court needs to intervene, that's why we have this action.
22 And *Trump v. Vance* frankly is spot on in saying this. We
23 can't ignore it, it is frankly very spot on.

24 THE COURT: And one of the cases the defendant has
25 cited to is the Second Circuit case *Temple of the Lost Sheep*,

1 *Incorporated v. Abrams*, it's 930 F.2d 178 where the Second
2 Circuit said that plaintiffs can adequately raise their
3 constitutional challenges to the Attorney General's conduct
4 in pending state proceedings. Why doesn't that apply here?

5 MS. HABBA: Because this is limited in scope, it is
6 not a proceeding yet, it is solely an investigation discovery
7 stage so there's no full and fair opportunity to litigate the
8 constitutional claims. The orders were nondispositive and
9 nonfinal. That is exactly the purpose that judges have that
10 option, and it is -- thank you for correcting the record,
11 that the September 2021 stipulation, stipulation, it was not
12 an order, it was a so-ordered stipulation which merely sets
13 forth the parties' briefing schedule for motions that were to
14 be subsequently filed. And it was clear that the parties did
15 not intend for the stipulation to adjudicate any of our
16 rights on substantive matters but only to set filing
17 deadlines. That is all he is -- he's made it very clear on
18 the record many times that that is his only purview.

19 THE COURT: Mr. Trump did file a motion to quash
20 the subpoena for his deposition, raising among other things
21 an equal protection selective prosecution claim. As I
22 understand it, he cited to comments, the same comments you've
23 cited to this court, in connection with that claim. Don't
24 all of the claims in this action arise out of the same
25 transaction as the equal protection selective prosecution

1 claim that Mr. Trump made in the state court proceedings?

2 MS. HABBA: No, your Honor, it doesn't, none of the
3 prior orders even remotely addressed, and our motions even
4 remotely addressed the issues raised in the instant action.
5 This much is really not in dispute. Even as recent as
6 February 14th, 2022, the Office of the Attorney General
7 acknowledged themselves, and this is a quote, "At no point
8 during the numerous contested rounds of briefing, evidentiary
9 submissions, and hearings here did anyone contend that the
10 OAG's investigation was unlawful, pretextual, or lacked a
11 rational basis." That is the claim before this court and
12 it's appropriate and can only be heard before this court. I
13 have no other vehicle to protect my client other than filing
14 motions to quash for every subpoena that I'm on the defense
15 of. I have no, no way to get discovery, no way to be on the
16 offensive and that is precisely what is unconstitutional. No
17 one can use an Article 4 proceeding to tie somebody else's
18 hands behind their back and say we're going to attack you and
19 as we choose to attack you, you can defend yourself but you
20 cannot attack back, I can't file a motion to dismiss, I can't
21 file a motion for summary judgment, I can't ask for
22 interrogatories. I'm asking the court to dismiss -- to deny
23 their motion to dismiss so that we have a fair chance to look
24 at these issues that I really do not have a venue for at this
25 point.

1 THE COURT: And let me ask you a question. The
2 complaint that you filed in this case appears to treat the
3 interests of Mr. Trump and the Trump Organization as aligned,
4 the complaint repeatedly says that the defendant's actions
5 were motivated by improper purpose against Mr. Trump and his
6 business, the Trump Organization. You represent both,
7 Mr. Trump and the Trump Organization, do you agree that their
8 interests are aligned with respect to this investigation, the
9 Attorney General's investigation?

10 MS. HABBA: Yes, your Honor, but named separately.
11 I think the office of the Attorney General, actually I'm
12 trying to just find my supplemental papers but I'd like to
13 quote it for the record. But off the top of my head, your
14 Honor, in the supplemental papers we have a footnote that
15 actually directly discusses this issue which says that there
16 was --

17 THE COURT: Ms. Habba, we can't hear you, you're
18 frozen. I believe we have someone from our IT department on
19 the call, maybe they can help.

20 (Pause in proceedings.)

21 MS. HABBA: My apologies, your Honor, we had --
22 technical difficulty, I have a great team that just got me
23 back up.

24 THE COURT: Great.

25 MS. HABBA: All right, I think I answered your

1 question but if not, please let me know.

2 THE COURT: Yes. And let me move to your motion
3 for preliminary injunction and the likelihood of success. I
4 know that the complaint alleges that this investigation was
5 conducted in bad faith, is a fishing expedition, was overly
6 broad. Have you provided any evidence in this action of an
7 overly broad investigation or a fishing expedition?

8 MS. HABBA: I think we have, your Honor. I think
9 that when, as you stated, we've produced millions, millions,
10 and millions of pages, we keep getting subpoenaed, they keep
11 looking for things, they don't find it, they look again.
12 Haystack, I should also correct for the record, has actually
13 been involved in this case for longer than just the contempt.
14 Haystack was an agreement that was made last year and we
15 actually gave them a tolling agreement to act again in good
16 faith and they just keep wanting to extend it. Truth be told
17 I believe the Office of Attorney General has asked for
18 another extension a couple weeks ago which we again granted,
19 we are still cooperating. But again, that just shows you,
20 it's been years and years and years, and without getting into
21 those merits which frankly are about valuations of property
22 which is the most subjective context ever. You pick
23 something that is -- you can have one person come in, it's
24 going to be an expert game, that's what this is going to be.
25 I'm going to get my expert, Cushman's going to get their

1 expert, that they're all going to tell you when these
2 independent parties, when Trump Organization looked at
3 valuations, they did them appropriately at the time, looking
4 at all the market values, there were things that were done,
5 there was no collusion, there was no mass -- that's the
6 merits of that which they have not even brought. They
7 just --

8 THE COURT: And let me just stop you, I didn't see
9 any evidence in this that you've provided to this court of an
10 overly broad investigation or a fishing expedition. As I
11 understand the record, Haystack is a third-party discovery
12 firm that you stipulated to, that the, that the plaintiff
13 stipulated to.

14 MS. HABBA: Well, yes, absolutely, and my point is
15 in bringing up Haystack is just to show your Honor how far
16 it's gone in terms of the fishing expedition. We have
17 been -- we're being, we're still being subpoenaed and
18 affidavits, additional affidavits all going to the same root
19 thing, an entire organization was searched and then they
20 subpoenaed Donald Trump again, that's a fishing expedition
21 because they didn't have enough to hook, line, and sink him
22 so then they have to try to get a special subpoena directly
23 for him to connect the dots when that doesn't exist. So
24 that's a perfect example, and apologies if I didn't, but I
25 think it speaks for itself the fact that there's been so many

1 documents turned over, continuous subpoenas, they just keep
2 going and fishing and now they're actually bringing in
3 Cushman & Wakefield and trying to threaten Cushman and going
4 after people that were third-party independent companies and
5 searching their documents and even going as far as to reach,
6 there's actually a pending motion right now with Cushman
7 going as far as to reach some of their other clients.

8 THE COURT: And let me ask you a question. What is
9 this court supposed to make of the fact that Justice Engoron,
10 who actually has reviewed thousands of documents in this
11 case, wrote a decision specifically finding that this
12 investigation is hardly unsubstantiated, and his review of
13 thousands of documents responded -- responsive to the AG's
14 subpoenas demonstrates that the AG has a sufficient basis for
15 continuing its investigation? What is the court to make of
16 that?

17 MS. HABBA: The investigation as to valuations have
18 nothing to do with what this action is. This action is about
19 constitutional violations of the Fourteenth Amendment due
20 process clause, the First Amendment freedom of speech, and
21 unreasonable search and seizures, abuse of process. We're
22 asking the court to do something very different here. This
23 isn't about valuations and I don't believe Judge Engoron's
24 actually been privy to any of the investigation documents or
25 the production so he actually doesn't -- hasn't seen what the

1 AG has seen is what my understanding is at this point. All
2 he's been doing is fielding discovery and subpoenas and he
3 actually hasn't gone into the merits because that's not his
4 job. So this is not about the merits of the underlying
5 investigation. Our case isn't about it and Judge Engoron has
6 said that he's not going to rule on that because that's not
7 his job. That court is solely for discovery which is why we
8 are needing your intervention, your Honor, exactly for that
9 reason.

10 THE COURT: I see. And Ms. Habba, I'll let you
11 make a final conclusive argument.

12 MS. HABBA: Okay, thank you, your Honor. I don't
13 want to waste your time. I think we addressed the *Younger*
14 doctrine and my feelings on that and that it doesn't apply.
15 *Cullen v. Fliegner* is particularly instructive here. In that
16 matter the bad faith exception applied on the basis that the
17 defendant's conduct displayed a sufficient level of animus
18 based on the past history of personal conflict between the
19 parties and the strictly ad hominem nature of the
20 investigation which is exactly what is occurring here.
21 Similarly, there is a well-documented history of ill will, as
22 we've mentioned, between Letitia James that she harbors for
23 Donald Trump and vicariously through the Trump Organization.
24 You know, I really rely on my papers, your Honor, I
25 don't want to waste your time, you've heard a lot of back and

1 forth and I think we did, you know, thank you for the
2 supplemental request, I feel that we really have put forth
3 all of our arguments and made very clear why Judge Engoron's,
4 and Judge Engoron's made very clear why his purview is very
5 limited in scope. He is not going to the investigation, he's
6 not looking at the merits of the investigation, and further,
7 that this case is being brought for different violations
8 against Ms. James that is exactly what no Attorney General
9 should ever do. It is an example of it and if we do not --
10 if we can't be heard by the federal court, I have no other
11 venue to be heard on this.

12 Thank you, your Honor, we ask that you obviously
13 dismiss their motion -- deny their motion to dismiss and
14 grant our motion for an injunction, preliminary injunction.

15 THE COURT: Thank you, Ms. Habba. Any brief
16 followup, Mr. Amer?

17 MR. AMER: Very brief, your Honor. I just want to
18 mention that we do think that the relief they're seeking
19 here, which is to enjoin the investigation at its very final
20 stages, would in fact interfere with the orders that have
21 clearly been issued by Justice Engoron. I did want to
22 mention, because Ms. Habba said there's no right to discovery
23 or to make a motion to dismiss in a special proceeding,
24 that's actually incorrect. While it's certainly the case
25 that discovery is not usual or customary in a special

1 proceeding, it is something that a respondent can ask for,
2 and they didn't ask for it so I think since they never asked
3 for discovery, they can't claim that they wouldn't have been
4 able to take discovery because we don't know what the court
5 would have permitted or not permitted. And I would suggest
6 your Honor look at CPLR 404 that does allow a respondent in a
7 special proceeding to move to dismiss if they so choose. I
8 think, you know, in terms of the affidavits that Ms. Habba
9 was saying they've been having to submit, those were all
10 ordered by Justice Engoron so it's clear. So again, we think
11 this court is being asked to interfere with what Justice
12 Engoron has ordered.

13 And my only final point is, it's incorrect to say
14 that Mr. Trump has been involved in the special proceeding in
15 New York only recently. I think it's clear that he owns and
16 controls and sits on top of the Trump Organization and as
17 recently as within the past week or two, we have stipulation
18 from Ms. Habba acknowledging that Mr. Trump controls the
19 documents that are in the possession of the Trump
20 Organization and the Trump Organization has been involved in
21 the special proceeding since August of 2020. So we certainly
22 think that both plaintiffs here have had ample opportunity to
23 raise all of the issues that they're raising here, and at
24 least one of the arguments, the equal protection argument,
25 relies on all the same allegations and comments that Justice

1 Engoron looked at and found unavailing. Instead, he was
2 convinced by what he characterized as copious evidence
3 submitted in our supplemental verified petition that the
4 investigation was clearly justified.

5 So I know we haven't had separate argument on the
6 PI application. The only thing I would mention here is that
7 we don't see any evidentiary support for irreparable harm.
8 There's no affidavit from Mr. Trump or anybody else from the
9 Trump Organization that his speech has in any way been
10 chilled. I think actually the court could even take judicial
11 notice of the various press releases that Mr. Trump has
12 issued over the past few months that actually comment
13 directly on what's happening in the New York proceeding. I
14 think it's fair to say that rather than his speech being
15 chilled, the New York proceeding has actually amplified his
16 speech in that regard. And absent an evidentiary basis for
17 irreparable harm, we think procedurally it's insufficient,
18 the court doesn't have the record that would permit issuing a
19 preliminary injunction.

20 THE COURT: Okay.

21 MR. AMER: Thank you, your Honor.

22 THE COURT: Thank you to both counsel, I will take
23 the motions under submission and issue a written decision.

24 MS. HABBA: Thank you, your Honor.

25 THE COURT: Thank you. Have a great day.

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MS. HABBA: You, too.

(Proceedings Adjourned, 11:00 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
United States District Court for the Northern
District of New York, DO HEREBY CERTIFY that
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/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter